Filed 6/26/19 Marriage of McCarty

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JAMES McCARTY and JOAN McCARTY.	
JAMES McCARTY, Appellant, v. JOAN McCARTY, Respondent.	G055684 (Super. Ct. No. 07D007264) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Julie A. Palafox, Judge. Affirmed.

Healy & Associates and Anne Marie Healy for Appellant.

Angell Law Office and Susan L. Angell for Respondent.

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I. INTRODUCTION

This appeal calls to mind Santayana's famous warning against redoubling your efforts when your original purpose has been forgotten. Ex-husband James McCarty's original purpose was to reduce his monthly spousal support payments to his ex-wife Joan. He had a reasonable basis for doing so. He had evidence Joan had remarried in Mexico a couple years before. He therefore filed a request for order (RFO) to end support on that basis. But he lost. In the process the trial court made a need-based attorney fee order against him for $16,000. He appealed both the denial of the request to end support and the $16,000 order.

That appeal remained pending during the events that form the basis of *this* appeal. In that interim, James didn't pay the fee order despite having received a large fund of over $150,000 from his mother's estate. Nor did he file a bond with the court during the pendency of the appeal. Joan's attorney therefore commenced collection proceedings against him. James then paid *most* of the $16,000, but never quite tendered enough to completely cover the entire amount after fees and costs were added. James brought a motion for *sanctions* against Joan's attorney, based on the manner in which she had tried to collect the fee award, which included bringing a motion to freeze James' attorneys' trust accounts. However, the trial court denied the sanctions motion, and assessed James another $5,000 in attorney fees for bringing it.

In this appeal, James asserts the denial of his sanction motion and the added $5,000 fee award constituted an abuse of discretion. We cannot agree.

II. BACKGROUND

James and Joan McCarty divorced in 2009. James has been ordered to pay Joan monthly spousal support ever since. In 2016, he filed an RFO seeking to terminate his support obligation on the ground Joan had remarried sometime prior. In July 2016, the trial court denied James' RFO, plus made a need-based attorney fee order against him

of $16,000. James timely appealed both the denial of his RFO and the $16,000 fee order.[1]

The trial court made the fee order on July 25, 2016. James didn't pay it at the time, though it appears Joan's attorney was willing to wait for James to receive a large distribution from James' mother's estate. Which he did, on, or just prior to, November 9, 2016. The distribution was for $152,525.97.

But James didn't pay and didn't want to. James had two avenues to avoid paying the $16,000 during the pendency of the appeal – an inexpensive possibility and a somewhat more expensive certainty. The inexpensive possibility was to request a stay of the order from either the trial court or the appellate court. But that was only a hope – such stays are discretionary. The more expensive, but certain, route was to obtain and file an appeal bond.

James chose the inexpensive route, but with a twist. He brought a motion for a stay in the trial court, but at the same time *obtained* an appeal bond – which he never filed. It appears the bond's purpose was to reassure the trial court that James was good for the money if it granted the stay.

But the trial court denied James' motion for stay on December 2, 2016. James could have filed the bond at this point, but he didn't. Nor did he simply pay off the $16,000 with the hope he might recoup the money should the $16,000 be eliminated or reduced on appeal.

Having not been paid, in mid-December 2016 Joan's counsel brought a contempt proceeding against James, which was heard January 27, 2017. At that hearing the court ordered James to pay $16,000 within 10 days. That meant his deadline to pay Joan's attorney was now February 6 at the latest.

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[1] This court would eventually reverse the RFO denial because the trial court did not have all the evidence bearing on Joan's possible remarriage in Mexico sometime in 2013. We affirmed, however, the $16,000 fee order. (See *In re McCarty* (Apr. 9, 2018, G054070) [nonpub. opn.] (*McCarty I*)). The appeal before us now concerns events that took place during the pendency of *McCarty I*, roughly between July 2016 and August 2017.

Again, he didn't pay. And so, on February 23, 2017, a little more than two weeks after James missed his February 6 deadline, Joan's counsel filed a motion which, among other things, sought to freeze amounts in the trust accounts of James' trial and appellate lawyers.[2]

At this point, James made an effort to pay the $16,000. Just after the February 23 filing, James gave $15,600 to an attorney named Lederman to give to Joan's counsel to pay off the debt. (Lederman was at that point considering substituting in as James' counsel, but later declined.) Joan's counsel had already collected $400 by levying on James' bank account, so James thought the $15,600 would completely discharge his debt.

It didn't. There were still outstanding processing fees and costs of $296.94. The $15,600 plus $400 levy was thus not quite enough to take care of the order.

The hearing on Joan's motion was scheduled for April 3, 2017. James filed a declaration just prior to that date promising to bring the $296.94 with him to the April 3, 2017 hearing. But the April 3, 2017 hearing never took place. Joan's counsel took it off calendar the day before. The status quo was left at an unpaid balance of $296.94 still owing to Joan's attorney.

On June 2, 2017, James' counsel filed the RFO which is the subject of this appeal. The RFO consisted of more than 150 pages (it makes up much of the record before us). The thrust of the RFO was that Joan's counsel should be sanctioned under section 271 of the Family Code and section 128.5 of the Code of Civil Procedure for the

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[2] Joan's attorney asserted that the court should freeze her adversary's trust accounts (1) "to satisfy any sanctions ordered"; (2) because "Appeal attorney can suddenly run up his bill typing a late brief and pay himself, then none of Jim's funds on deposit will be available to satisfy the judgment to Joan's attorney"; and (3) because "Attorney Healy can empty her accounts and hide her money as well." Joan's counsel further contended that the freezing of accounts would result in "no harm to Jim because he has a lot more money he received something in the neighborhood of $90,000 from the probate case, so he can simply and easily replenish his appeal attorneys retainer."

The actual figure of money received from the probate case was, as we have noted above, over $152,000.

"manner in which the Petitioner [Joan] attempted to enforce the order for attorney's fees[.]" Because of that "manner," James had incurred fees of his own in excess of $13,000. James also sought orders allowing the deposition of Joan's attorney.

The June RFO was heard on August 11, 2017. The trial court began the hearing by admonishing both counsel to conduct themselves with more courtesy toward each other. The court read from a trial court research attorney's memo to the judge who was appalled at the level of acrimony on the part of both attorneys.[3]

The trial court then noted James had not paid the $16,000. He had been given a direct order to pay it within 10 days of January 27, i.e., by February 6, and had missed that deadline. In fact, James hadn't paid the *complete* balance of the $16,000 order when the various fees and costs were added in even by the August 2017 hearing. There was still – at least according to Joan's attorney – a balance of $795.18 outstanding, though James' attorney disputed that exact amount.

All the expenses incurred by James, the trial court noted, were James' own fault. The judge then dug deeper for the reasons underlying the RFO. James' attorney was clearly incensed by Joan's attorney's motion to freeze her trust account, plus the tendency of Joan's attorney to bombard her with multiple emails and faxes in the course of the litigation. The last straw, it seemed, was the fact – or perception – that Joan's attorney had accused James' attorney of lying. The judge asked James' attorney: "Is your whole motion of sanctions based on the lack of respect?"[4]

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[3] The staff memo read: "The dialog between Ms. Angell and Ms. Healy falls well below the professional level one would expect from attorneys and both should most likely be admonished by the court. The level of acrimony between counsel exacerbates the hostility between the parties and should cease immediately."

[4] James' attorney answered the judge by pointing to a plethora of failures to communicate: "Ms. Healy: No. [¶] The Court: Okay. [¶] Ms. Healy: She let us sit in court for three hours when we asked to continue her August 8th hearing – or August 4th hearing to today's date when I was going to be out of town. She send [*sic*] the emails and the faxes over and over again. She rewords them a little different. She puts 'meet and confer' at the top of every single one, which in my career, over 18 years, if somebody wants to meet and confer, you cannot ignore them because nobody wants to be admonished by the court. [¶] But when I do respond to them, she takes my words and twists them for her purposes. And every single email and fax that I've ever responded [to], which is nowhere near the level of what I received from Ms. Angell. Last year I indicated I received 54 emails over four days from Ms. Angell. It's a constant barrage."

The trial court first denied James' request to take Joan's attorney's deposition. At that point – as noted by the trial judge on the record – James walked out of the courtroom.

As to the problem of why James had not paid the $16,000 in the first place, his attorney offered the explanation that James had somehow gotten the idea from a conversation with his appellate attorney in *McCarty I*. James' takeaway from that conversation was that he didn't have to pay the money if there was a pending appeal. In point of fact, as that attorney's own declaration revealed, he merely told James that James could hold off paying while the motion for stay back in December was pending. In any event, the trial court denied James' RFO for sanctions and then assessed a further $5,000 against him for the fees his motion had caused Joan to incur.

James timely appealed the order. On appeal he does not challenge the trial court's protective order against his deposing Joan's attorney. He only challenges the denial of his request for sanctions and the assessment of the (further) $5,000 in need-based fees.

III. DISCUSSION

James' opening brief prepared by his trial counsel – not his appellate counsel from *McCarty I* – does not comply with California Rules of Court, rule 8.204(a)(1)(B), which requires each argument made in a brief to be stated in "a separate heading or subheading *summarizing the point*." (Italics added.) James' opening brief presents no points in its headings or subheading, which consist of mere topic divisions.[5] We could stop there.

The exchange continues for another two paragraphs on the general theme that Joan's attorney was trying to wear down James by causing him to incur fees responding to various communications from Joan's attorney.

[5] The only heading is "Legal Argument" and then under that, three subheadings: "Denial of Sanctions," "Stay of Payment of Attorney's Fees" and "Attorney's Fees."

But we elect to discuss the merits. The essence of the opening brief's argument seems to be that the trial court should have accepted James' counsel's assertion that Joan's counsel was lying about her, and, regardless of the fact James never paid the $16,000 in full, should have been sanctioned for it. The appeal is best encapsulated in this revealing sentence from page 28 of the opening brief, where the author slides into the use of the first person singular: "The court may have said Attorney Angell could take steps to enforce the payment of attorney's fees, but if the court didn't actually read the documents where it was pointed out that Attorney Angell was trying to do things that were inappropriate, or that she was making up lies, I don't believe the court would have said that Attorney Angell had the right to do whatever she wanted to get the attorney's fees paid."

But James' argument, regardless of the accuracy of his counsel's complaint that opposing counsel was lying about her, fails on one key fact: *Everything* in this appeal can be traced to James' decision not to obey the trial court's order of July 2016 to pay Joan's attorney $16,000, or even file an appeal bond. *All* the supposed lies told about Attorney Healy by Attorney Angell, the motion to freeze the attorney trust accounts, even the multitude of supposedly frivolous or harassing emails or faxes, were the result of James' recalcitrance in not paying or bonding around the $16,000 order.[6] Had James simply paid the money or filed a bond, this appeal would never have occurred and James himself would be a great deal wealthier.

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[6] On page 25 of the opening brief, James' attorney stresses the tactics used by Joan's attorney to collect the fee award: "It's difficult to believe that when someone is preparing and filing a multitude of documents full of untruths, half-truths, and down-right lies, they should be awarded attorney's fees. [¶] It seems as if the Court didn't read the many declarations filed by Attorney Healy because it is difficult to believe that, when someone is behaving badly, that would be overlooked."

While we affirm the trial court's decision to deny James' motion as insufficient because James disobeyed a court order, we do not condone unfair tactics, and it does appear that Joan's attorney did indeed overload James' attorney with an unreasonable number of emails.

Sanctions under Family Code section 271 and Code of Civil Procedure section 128.5 are, as the opening brief admits, matters of trial court discretion. The rule on appeal is that when the trial court makes an order for the payment of money, the aggrieved litigant must either obtain a bond pending an appeal or otherwise suffer collection. (See *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1427; Code Civ. Proc., § 917.1, subd. (a)(1); Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶¶ 7:120- 7:121, p. 7-40.) Given that all the fees incurred by James fending off Joan's February 23, 2017 motion were the result of his attempt to avoid paying a fee order made by the trial court, the trial court's denial of his RFO for sanctions was eminently reasonable.

We will only add this thought: The trial court was not obliged – nor are we – to sift through a multitude of conclusory allegations to the effect that one attorney was lying about another. We note that James' opening brief fails to itemize those alleged lies, or offer uncontroverted proof the alleged lies really were untruths. Rather, there is only a hodgepodge of generalized allegations.

In light of our conclusion in regard to the denial of the sanction motion, the $5,000 order readily passes abuse-of-discretion muster. The trial court was aware of the disparity of assets between the parties, in particular the $150,000-plus distribution James had received from his mother's estate. By itself that disparity was enough to make the order reasonable.[7] James also points to nothing that shows the $5,000 fee award was unreasonable on its merits. From our vantage point, the amount seems within the ball park of reasonability given that its genesis was the defense of the previous attorney fee order – and one this court affirmed in *McCarty I.*

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[7] Part of James' appellate argument depends on references to an augmented clerk's transcript, which – from our records – this court never received. It is, of course, the responsibility of appellant to demonstrate error or abuse of discretion at the trial by furnishing an adequate record demonstrating it. (E.g., *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) However, just looking at the argument as presented in the opening brief, James cannot prevail in any event because he ignores the disparity of assets within the control of the parties.

IV. DISPOSITION

The order of August 11, 2017, is affirmed. Joan will recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.